# Ontario Court of Appeal Upholds Class Certification in the Quizno's Case: The Door Opens for Increased Competition and Franchise Litigation in Canada

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On June 24, 2010, the Ontario Court of Appeal released its long-awaited decision in the *Quizno's* case. In short, the Court of Appeal unanimously affirmed the Divisional Court's certification of a competition and franchise class action against a significant national franchisor for a range of contractual and antitrust claims arising from the franchisor's vertical supply and pricing arrangements. The decision is significant since (i) the Court embraced a line of reasoning that will make it easier to seek certification of class proceedings in Canada, particularly in respect of claims that require proof of harm or damage as a component of liability; (ii) the Court appears to have endorsed a lower threshold for the certification of competition class actions in Canada; and (iii) the Court found that franchise disputes represent "exactly the kind of case for a class proceeding." In summary, the Court's decision suggests that franchisors and companies that implement vertical pricing and exclusive supply arrangements may be exposed to increased class proceedings litigation in Canada.

## Summary of Decisions Below

In *Quizno's Canada Restaurant Corporation v. 2038724 Ontario Ltd.*,[1] the representative plaintiff alleged that franchisees were charged exorbitant prices for food and other supplies purchased for use in restaurants. The plaintiff alleged this implicated *Competition Act* conspiracy and price maintenance claims between Quizno's, the franchisor, and Gordon Food Services, from whom franchisees were required to purchase supplies used at Quizno's restaurants.

The motions judge who first heard the plaintiff's certification motion refused to certify the class action because he concluded that damages could not be determined on a class-wide basis. The judge concluded the plaintiffs had not established a methodology for calculating what the prices for the franchisees would have been (and what the franchisees ought to have paid) if there was no conspiracy or price maintenance. This is the typical way for determining damages in a *Competition Act* conspiracy case: the difference between the actual price paid for a product and the price that should have been paid for a product if there were no conspiracy or price maintenance.

The Divisional Court reversed the motions judge, concluding that the motions judge erred in his analysis of whether damages could be determined on an aggregate basis, and in failing to conclude that there were sufficient common issues that could

have been determined on a collective basis to warrant certifying the class action.

## Summary of Decision of Court of Appeal

The Court of Appeal agreed with the Divisional Court's decision, affirming the certification of the class action. It concluded:

- Although a civil claim for damages under the *Competition Act* requires proof of harm or damage, proving the existence of price maintenance under s. 61 of the *Competition Act* does not require evidence of damage, and can be determined on a class-wide basis.
- Likewise, although a civil claim for damages under the *Competition Act* requires proof of harm or damage, determining whether there has been an unlawful agreement to fix prices may be determined on a class-wide basis.
- In a motion for certification, a plaintiff is only required to prove that there is a reasonable likelihood that damages can be proven on an aggregate basis. It is for the trial judge, not the motions judge, to determine whether damages can in fact be determined on an aggregate basis. Even if damages cannot be determined on an aggregate basis, this is not fatal to a motion for certification because common issues and individual issues can both be accommodated in a class proceeding.

## Impact of Quizno's on Competition Act and Franchise Claims

The Court of Appeal's decision is significant, and will have implications for class action practice, competition litigation and franchise litigation across Canada.

First, the Court of Appeal embraced a line of reasoning that will make it easier to seek certification of class proceedings in Canada, particularly in respect of claims that require proof of harm or damage as an integral component of liability. In its reasoning, the Court of Appeal suggested that a plaintiff is only required to establish that "there is a reasonable likelihood" that the requirements of the aggregation provisions would be met at trial in order to establish the existence common issues.[2] While the defendants had adduced extensive expert at the certification motion on the absence of commonality, the Court of Appeal gave that evidence short shrift, and found that "it is unnecessary ... to engage in the debate about the relative strengths and weaknesses of the expert evidence" at the certification stage.

Second, the Court of Appeal's decision appears to have lowered the threshold for the certification of competition class actions in Canada. Historically, the courts had been reluctant to certify competition class actions in contested cases, due to the immense challenges of formulating a methodology for establishing loss and liability on a class-wide basis, particularly in cases involving diverse products distributed through a complex distribution chain. However, in the past two years, the courts across Canada have certified an increasing number of antitrust class actions on behalf of direct and indirect purchasers. For instance, in September 2009, the Ontario Superior Court certified a direct and indirect class in the hydrogen peroxide case.[3] In November 2009, the B.C. Court of Appeal certified a direct and indirect class in the DRAM case.[4] Earlier this year, the B.C. Supreme Court certified an indirect class in the Microsoft case.[5] The *Quizno's* decision reflects a continuation of this trend, and it represents the first time that the Ontario Court of Appeal has certified a competition class action. On its face, the Court's decision is difficult to reconcile with its prior decision in *Chadha*, where the Court declined to certify a class of indirect purchasers in a horizontal price-fixing case. But the facts of *Quizno's* are unique. It can be potentially distinguished on the basis that it is a strictly vertical resale price maintenance case involving an (arguably) direct class of purchasers.

In its decision, the Court of Appeal properly noted that Parliament had repealed the offence of price maintenance in 2009.[6] However, this amendment arguably did not have retroactive effect, and as a result, the Court's decision may renew scrutiny of

vertical pricing and distribution practices prior to 2009, particularly in cases involving resale prices and exclusive sourcing of supply. In any event, plaintiffs have been recently successful in seeking certification of similar claims under the tort of conspiracy.[7] As such, given the result in *Quizno's*, companies may continue to face class proceedings in cases involving claims of vertical price-fixing and exclusionary practices.

Third, the Court of Appeal's decision is notable from a franchising perspective. The franchise class action certified is for claims not based on provincial franchise legislation like *Ontario's Arthur Wishart Act (Franchise Disclosure), 2000*. Further, the decision indicates that courts hearing franchise class actions are willing, in appropriate circumstances, to determine as a common issue whether there has been a breach by the franchisor of a specific provision of a standard form franchise agreement. Finally, in determining that a class proceeding was the preferable procedure to resolve the common issues, the Court of Appeal specifically found that "a dispute between a franchisor and several hundred franchisees is exactly the kind of case for a class proceeding."

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1 2010 ONCA 466.

2 See similarly *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.).

3 *Irving Paper Ltd. v. Atofina Chemicals Inc.* (2008), 89 O.R. (3d) 578 (S.C.J.)(leave to appeal denied June 8, 2010).

4 *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503 (CanLII), 2009 BCCA 503.

5 *Pro-Sys Consultants Ltd. v. Microsoft*, 2010 BCSC 285 (CanLII), [2010] B.C.J. No. 380 (Q.L.).

6 See Osler Update, dated March 12, 2009.

7 *Pro-Sys Consultants Ltd. v. Microsoft*, 2010 BCSC 285 (CanLII), [2010] B.C.J. No. 380 (Q.L.).